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Supreme Court, U.S.
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CASE NO. 97-__

IN THE UNITED STATES SUPREME COURT

October Term 1997

THE STATE OF FLORIDA,
Petitioner,

vs.

LEONARDO FRANQUI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED

Whether the Florida Supreme Court erred in determining, contrary to the view of most federal and many state courts, that the admission of a nontestifying codefendant's statement violates the Confrontation Clause because the exception to the hearsay rule for statements against penal interest is not "firmly rooted," and that such statements can never exhibit sufficient particularized guarantees of trustworthiness to be admitted against the defendant unless they do not mention the defendant at all?

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CASE NO. 97-__
IN THE UNITED STATES SUPREME COURT
October Term 1997

THE STATE OF FLORIDA,
Petitioner,

vs.

LEONARDO FRANQUI,
Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Franqui v. State, 699 So. 2d 1332 (Fla. 1997).

Petitioner's Appendix contains the opinion of the Florida Supreme Court below, case number 84,701, as well as the court's order denying rehearing. The parties will be referred to as they appear before this Court or as they stood in the trial court: "Petitioner" or "the State" and "Respondent" or "Defendant."

JURISDICTION

The judgment under review was entered on July 3, 1997. Rehearing was denied on October 7, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3). The Court has granted Petitioner's motion to extend the filing date for this petition until January 16, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Defendant and his codefendants Ricardo Gonzalez and Pablo San Martin were convicted of the first degree murder of a law enforcement officer, armed robbery, aggravated assault, and two counts of grand theft, and sentenced to death. Franqui v. State, 699 So. 2d 1332, 1333-34 (Fla. 1997)(Franqui II).[1] The Florida Supreme Court recited the following facts in the opinion under review:

> The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles

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[1] Defendant has two capital murder convictions. The first, for the December 6, 1991, murder of Raul Lopez, was imposed after Defendant's joint trial with Pablo San Martin. Franqui v. State, 699 So. 2d 1312 (Fla. 1997)("Franqui I"). The second conviction, the decision under review herein, will be referred to as "Franqui II," and was for the January 3, 1992, murder of police officer Steven Bauer. In that case, Defendant was jointly tried with codefendants Pablo San Martin and Ricardo Gonzalez.

were found abandoned two blocks west of the bank.

Approximately two weeks later, codefendant Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. He was subsequently reinterviewed by police and, among other things, described how Franqui had shouted at the victim not to move before shooting him.[2]

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank

a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of Franqui, the confessions of codefendants San Martin and Gonzalez were introduced without deletion of their references to Franqui, upon the trial court's finding that their confessions "interlocked" with Franqui's own confession. In addition, an eyewitness identified Franqui as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints were found on the outside of one of the vehicles. Ballistics evidence demonstrated that codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that Franqui had shot the victim in the leg with his .9 mm handgun.

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[2] San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the codefendant Fernandez and that the planning occurred at Fernandez's apartment. San Martin admitted that he had grabbed the money tray during the

> robbery but could not say who carried guns or did the shooting.

Id. (footnote the court's).

Defendant challenged the admissibility of the statement of codefendants Gonzalez and San Martin in the trial court. The State argued that they were properly admissible under Cruz v. New York, 481 U.S. 186 (1987), Lee v. Illinois, 476 U.S. 530 (1986), and Grossman v. State, 525 So. 2d 833 (Fla. 1988), and the trial court admitted them. (R. 115, 122-28). Defendant raised the issue on appeal,[2] asserting that the admission violated Bruton v. United States, 391 U.S. 123 (1968); the State responded that the admission was proper, and if not, harmless. In reliance on its opinion in Franqui I, the Florida Supreme Court ruled that the trial court erred in admitting Gonzalez's statement. Franqui II, 699 So. 2d at 1335. In Franqui I, the Florida Supreme Court had overruled Grossman, and further held that a codefendant's declaration against penal interest is not a firmly rooted exception to the hearsay rule, 699 So. 2d at 1318-19, and its admission thus will violate the Confrontation Clause unless the circumstances surrounding the statement demonstrate particularized guarantees of trustworthiness, id., and further, that the only such circumstance to be considered is whether the codefendant's statement was "individually self-incriminating," which the court construed to mean devoid of any mention of the defendant or the defendant's actions. 699 So. 2d at 1320. In this case, the Florida Supreme Court found the error to be harmless as to Defendant's conviction, but reversed Defendant's sentence because "[i]n Gonzalez's confession he went into great detail in characterizing Franqui as the leader of the robbery plan." Franqui II, 699 So. 2d at 1336.

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[2] On appeal he conceded that San Martin's statement had been properly admitted. The only issue presented was as to Gonzalez's statement.

Although the error was held harmless in Franqui I, 699 So. 2d at 1322, 1329, the State has sought review of that case because, in reliance on it, the Florida Supreme Court has reversed not only the sentence in this case, but the death sentence of Defendant's Franqui II-codefendant in Gonzalez v. State, 700 So. 2d 1217, 1219 (Fla. 1997), and the convictions and sentences of death in Dennis Escobar v. State, 699 So. 2d 984, 986 (Fla. 1997), and Douglas Escobar v. State, 699 So. 2d 988, 992 (Fla. 1997).[3] In San Martin v. State, 1997 WL 792796 (Fla. Dec. 24, 1997), the companion case to Franqui I, the court held that Bruton error occurred, but was harmless. San Martin v. State, No. 84,702, in which San Martin has also raised the Bruton issue in challenging his conviction and sentence for the Bauer murder, remains pending in the Florida Supreme Court.[4]

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[3] Apart from the Florida Supreme Court having based its reversal on Franqui I, the Escobar brothers' cases are wholly unrelated to that of Defendant or his accomplices.

[4] Another codefendant in both murders, Pablo Abreu, pled guilty prior to trial and received life sentences. The final codefendant in the Bauer case, Fernando Fernandez, was tried before a separate jury. No Bruton issue was raised in his capital appeal, which is also pending in the Florida Supreme Court as Fernandez v. State, No. 84,700.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT AMONG STATE AND FEDERAL COURTS AS TO WHETHER THE EXCEPTION TO THE HEARSAY RULE FOR STATEMENTS AGAINST PENAL INTEREST IS "FIRMLY ROOTED", AND AS TO WHETHER SUCH STATEMENTS, WHEN MADE BY A NONTESTIFYING CODEFENDANT, CAN EVER EXHIBIT SUFFICIENT PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS TO BE ADMITTED AGAINST THE DEFENDANT.

A. The Florida Supreme Court erred in determining, contrary to the view of most federal and many state courts, that the admission of a nontestifying codefendant's statement violates the Confrontation Clause because the exception to the hearsay rule for statements against penal interest is not "firmly rooted."

In Ohio v. Roberts, 448 U.S. 56, 64-66 (1980), and again in Idaho v. Wright, 497 U.S. 805, 814-15 (1990), this Court set forth a two-prong test enunciating the circumstances under which the statement of a nontestifying witness may be admitted against a Defendant in a criminal trial. Under the first prong of the test, such a statement may be admitted without running afoul of the Confrontation Clause if it falls within a "firmly rooted" hearsay exception.[5] The question presented is

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[5] The second prong, relating to statements not falling within a firmly-rooted exception, is addressed at Subpoint B, infra.

whether the hearsay exception for statements against penal interest is firmly rooted so as to allow such statements to be directly admitted against the declarant's accomplice without violating the Confrontation Clause. This issue has not been addressed by the Court, see Williamson v. U.S., 512 U.S. 594, 114 S. Ct. 2431, 2437 (1994)(O'Connor, J.)("in particular we need not decide whether the hearsay exception for declarations against penal interest is "firmly rooted" for Confrontation Clause purposes"), and is a matter of dispute among the state and federal courts that have addressed it, causing aberrant results in an area where uniformity in the application of a legal principle is desirable, if not mandated.

Below, the Florida Supreme Court relied on its previous holding in Franqui I, and concluded that error occurred.[6] In that case, the court recognized the Roberts rule, Franqui I, 699 So. 2d at 1319, but concluded that statements against penal interest are not firmly rooted. The court reasoned that because such statements were specifically excluded by the Florida evidence

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[6] The court's entire analysis as to error follows:

> In [Franqui I] we discussed in detail the law applicable to the admissibility of a codefendant's confession. In this case there is no question that Gonzalez's confession interlocked with Franqui's confession in many respects and was substantially incriminating to Franqui. Moreover we cannot say that the totality of the circumstances under which Gonzalez made his confession demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.
>
> Thus the admission of Gonzalez's confession was error.

Franqui II, 699 So. 2d at 1335.

code from 1977 until 1990, the exception could not be considered firmly-rooted.[7] Id. Both the Florida Supreme Court's reasoning in Franqui I and its conclusion herein are flawed.

The Florida Supreme Court has illogically concluded, based solely on the recent history of Florida's evidentiary provisions, rather than federal interpretation of the Confrontation Clause, that for the purposes of the federal Confrontation Clause, the exception for declarations against penal interest is not firmly-rooted. This question can only be determined by looking at the evidentiary practices of the nation as a whole, especially federal interpretations. Were the court's reasoning followed, a different meaning of the term "firmly-rooted" would ensue for every individual state, depending upon the dictates and history of that state's rules of evidence. The state court's analysis stands in stark contrast with this Court's approach in White v. Illinois, 502 U.S. 346, 355 n.8 (1992), where the Court, holding that the hearsay exceptions for spontaneous declarations and statements made for medical treatment were

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[7] Even this conclusion is suspect, however. Before the adoption of the evidence code, the court had recognized declarations against penal interest as an exception in Baker v. State, 336 So. 2d 364 (Fla. 1976). The exception was included when the new evidence code, which was modeled on the federal rules, was statutorily adopted. §90.804(2)(c), Fla. Stat. (1977). The court below was apparently referring to additional language in the Florida version of the rule that prohibited the use of such statements against criminal codefendants jointly tried. Id. Several courts, however, had concluded that the limiting language was merely intended to codify Bruton, and, as such, had held that it did not prohibit the admission of any statements admissible under Bruton and its progeny. See Charles W. Ehrhardt, Florida Evidence §804.4 (1996); Maugeri v. State, 460 So. 2d 975, 980 (Fla. 3d DCA 1984); Cipollina v. State, 501 So. 2d 2, 3 (Fla. 2d DCA 1986), rev. denied, 509 So. 2d 1119 (Fla. 1987). The limiting language was repealed in 1990. §90.804(2)(c), Fla. Stat. (1991).

firmly rooted, looked to the historical evolution of those exceptions in 17th century English common law, and further observed that the evidence codes of almost four-fifths of the states currently recognized the exception, as did the Federal Rules of Evidence. Similarly, in Bourjaily v. United States, 483 U.S. 171, 182-84 (1990), the Court, in recognizing as firmly rooted the co-conspirator exception, looked, not to any single state's treatment of that exception, but to early federal case law. Thus, the Florida Supreme Court's narrow focus on Florida's treatment of declarations against penal interest was inappropriate in determining whether that exception is firmly rooted under the Confrontation Clause of the United States Constitution.

Had the court looked beyond the borders of Florida, it would have found that the overwhelming majority of federal appellate courts have determined that the exception is firmly rooted. See United States v. Trenkler, 61 F. 3d 45, 62 (1st Cir. 1995)(declaration against penal interest is firmly rooted exception); United States v. Katsougrakis, 715 F. 2d 769, 775 (2d Cir. 1983); Neumann v. Rivers, 125 F.3d 315, 319 (6th Cir. 1997); United States v. York, 933 F. 2d 1343, 1363 (7th Cir. 1991)("Our holding in Garcia was tantamount to saying that the exception is well-rooted within the meaning of Roberts and Bourjaily, and we affirm that view today"); Berrisford v. Wood, 826 F.2d 747, 751 (8th Cir. 1987);[8] Jennings v. Maynard, 946 F. 2d 1502, 1505 (10th Cir. 1991)[9]; United

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[8] The Eighth Circuit appears to draw a distinction between custodial and non-custodial statements against penal interest, concluding that while the latter fall within a "firmly rooted"exception, the former do not. See, e.g., Olson v. Green, 668 F.2d 421, 428 (8th Cir. 1982). The State submits this is not a valid distinction; see the discussion of Lee v. Illinois, infra.

[9] Jennings was reconstrued by the 10th Circuit in Earnest v. Dorsey, 87 F. 3d 1123, at n. 6 (10th Cir. 1996), where the Court stated that it was not addressing "whether, in general, the exception for statements against penal interest is firmly rooted."

States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991). The only federal appellate court to expressly come to a contrary conclusion is the Fifth Circuit, in United States v. Flores, 985 F. 2d 770 (5th Cir. 1993).

At least eight states have concluded that the exception is firmly rooted. State v. Jankiewicz, 831 S.W.2d 195, 198 (Mo. 1992); State v. Sego, 629 A.2d 1362, 1367 (N.J. Super. App. Div. 1993); State v. Tucker, 820 P. 2d 834, 838 (Or. App. 1991), rev. denied, 855 P.2d 150 (Or. 1993); Aylor v. State, 1997 WL 136479 (Tex. App. Mar. 26, 1997)(unpublished opinion); State v. Drawn, 791 P.2d 890, 894 (Utah 1990); Randolph v. Com., 482 S.E.2d 101, 105 (Va. 1997); State v. Denny, 471 N.W. 2d 606, 609 (Wis. App. 1991); State v. Dorcey, 298 N.W. 2d 213, 216 (Wis. App. 1980), aff'd, 307 N.W. 2d 612 (Wis. 1981).[10] A number of state appellate courts have, on the other hand, found the exception not to be firmly rooted. Linton v. State, 880 P.2d 123, 129 (Alaska App. 1994); State v. Daniel, 817 P.2d 18, 20 (Ariz. 1991); People v. Fincham, 799 P.2d 419, 422 (Colo. App. 1990); State v. Kimble, 688 So. 2d 552, 565(La. App. 1996)(on rehearing); Chapman v. State, 628 A.2d 676 n.3 (Md. 1993); People v. Spinks, 522 N.W.2d 875, 878 (Mich. App. 1994); State v. Watts, 452 N.W.2d 728, 732 (Minn. App. 1990); State v. Hughes, 510 N.W.2d 33, 38 (Neb. 1993); State v. Abourezk, 359 N.W.2d 137, 141 (S.D. 1984)(on rehearing); State v.

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[10] Dorcey was followed in State v. Thornton, 322 N.W.2d 699 (Wis. App. 1982), 1982 WL 172430, ***3 (unpublished opinion), but ignored in State v. Myren, 395 N.W.2d 818, 821 (Wis. App. 1986), in which the court concluded that Lee prevented it from considering the issue. In Denny, Myren was not mentioned, and the court held that the exception was firmly rooted.

Whelchel, 801 P.2d 517, 952 (Wash. 1990); State v. Mason, 460 S.E.2d 36, 46 (W. Va. 1995).[11]

Some of the latter courts have relied on Lee v. Illinois, 476 U.S. 530 (1986), in concluding that the hearsay exception for statements against penal interest is not firmly-rooted.[12] These courts have misread Lee because that case did not squarely confront the issue, but merely "reject[ed] respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.'" 476 U.S. at 544 n.5. The Lee footnote should not be broadly read as concluding that a statement against penal interest is not firmly rooted, or that a statement falling under the exception cannot satisfy the Confrontation Clause. The Court's subsequent discussion of the statements in Lee makes it questionable whether the portions of the statements inculpating the defendant in Lee would have qualified as statements against penal interest. See Williamson, discussed infra. The better reading of note 5,[13] particularly in light of Williamson's subsequent limitations on which statements qualify as being against penal interest is simply that the statements in question would not have qualified, obviating any studied consideration of the issue. See York, 933 F.2d at 1363

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[11] New Hampshire appears to have concluded that the exception is not firmly rooted. See State v. Cook, 610 A.2d 800, 808 (N.H. 1992)(Thayer, J., specially concurring and objecting to the majority's failure to treat exception as firmly rooted).

[12] Lee has also caused at least one federal court to question its previous conclusion that the exception is firmly rooted. See Latine v. Mann, 25 F.3d 1162, 1166 (2d Cir. 1994)(questioning whether the court's previous conclusion in Katsougrakis, that the statement against penal interest exception was firmly rooted, survived Lee, but declining to address the issue).

[13] The language of note 5 does not make clear the precise argument that the state had advanced, i.e., whether it was even posited that the penal interest exception was firmly rooted.

n.4 (so holding); Randolph, 482 S.E.2d at 105 n.3 (same); State v. Nielsen, 853 P.2d 256, 270 n.16 (Or. 1991)(same); also Drawn, 791 P.2d at 894 (citing Lee as a limitation on statements qualifying as against penal interest).[14]

Accepting that statements against penal interest qualify as firmly rooted, the question remains whether the statement at issue here qualifies.[15] The Court thoroughly discussed the limits of the exception in Williamson. In that case, the Court concluded that only the portions of the declarant's statement that are "truly self-inculpatory" fall within the exception. 114 S. Ct. at 2436. The Court further noted that "[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." 114 S. Ct. at 2436. Any portion of a statement inculpating the codefendant must be viewed in context, bearing in mind that even statements that on their face do not suggest guilt may be self-inculpatory where they expose the declarant to criminal liability. 114 S. Ct. at 2437.

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[14] See also Cruz v. New York, 481 U.S. 186, 194 (1987), where the Court stated that no Bruton violation occurs where the codefendant's statement is "directly admissible against" the defendant. Presumably the determination of "direct admissibility" is made according to the Roberts formulation. Of note, both Lee and Cruz were squarely predicated on Bruton, wherein it was also explicitly pointed out that the Court was "intimat[ing] no view whatever" as to whether a statement admissible "under traditional rules of evidence" would run afoul of the Confrontation Clause. Bruton, 391 U.S. at 128 n.3. It should also be noted that Bruton involved a federal prosecution governed by the Federal Rules of Evidence, which at the time of the trial therein did not provide for a hearsay exception for declarations against penal interest.

[15] Florida's rule is identical to the federal rule. See Fed. R. Evid. 804(b)(3); §90.804(2)(c), Fla. Stat.

Under these standards, the statement of Defendant's codefendant, Ricardo Gonzalez, comes squarely within the exception. Although Gonzalez indicated that he participated in and committed the robbery that led to the murder of Officer Bauer with Defendant and the other three accomplices, at no point did he attmept to minimize his own guilt. Rather, to the extent his accomplices were mentioned, it was in the context of a joint enterprise. And indeed, when relating the crucial events surrounding the shooting, Gonzalez's statement in no significant way minimized his own conduct or tried to curry favor by giving evidence against Defendant

The Florida Supreme Court, in the context of its penalty-phase harmless error analysis, decribed Gonzalez's statement as going into "great detail characterizing Franqui as the leader of the robbery plan." Franqui II, 699 So. 2d at 1336. Even were this an accurate reading of Gonzalez's statement, it would in no way detract from the wholly self-inculpatory nature of Gonzalez's description of his own activities. In his confession, Gonzalez stated that he agreed to participate in the planned robbery of the bank, and then on the appointed day, accepted a firearm, exited his vehicle with the gun drawn, approached two tellers and the armed police officer as they walked accross the bank lot, and then shot the officer when the officer drew his own gun, after which he accepted his share of the proceeds ($1500). (T. 1409-1415, 1549-50) In short, he confessed to being a full participant, as one of the two shooters out of five accomplices, to a capital crime. As such, the only dispute between Gonzalez's statement and that of Defendant, as to which of the two fired first is also of little moment. Whether Defendant fired and then Gonzalez a second later, (per Gonzalez's statement) or vice versa (per Defendant's), the critical fact is that Gonzalez stated that he, Gonzalez, did shoot the police officer in the course of the robbery. Indeed, in a second interview, Gonzalez clarified the details of the shooting, explaining that he and Defendant had the

officer pinned between them, so that "there was nowhere for the officer to go" and then they shot him. (T. 1568). Under Williamson, there can be little doubt that his statement was truly self-inculpatory and thus properly admissible as a statement against penal interest.[16]

Assuming the statements in question do qualify as statements against penal interest, and assuming that the exception qualifies as firmly rooted, there is no basis to depart from Roberts' analytical framework, as recently reaffirmed in Wright. Any implication in footnote 5 of Lee that a statement against penal interest is somehow less trustworthy than any other firmly-rooted hearsay exception is unwarranted. "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Wright, 497 U.S. at 817.

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[16] The Florida Supreme Court had previously read Cruz to allow codefendant confessions to be admissible if their "interlocking" nature showed them to be reliable. See Grossman v. State, 525 So. 2d 833, 838 (Fla. 1988). Relying on Grossman, the trial court had thus deemed Gonzalez's statement admissible because it and Defendant's statements were "as concern[ed] all material details, indistinguishable" and therefore "contain[ed] the indicia of reliability necessary to allow their introduction during a joint trial as direct evidence." (R.127). In Franqui I, the court concluded that Grossman was no longer viable in the wake of Wright's holding that the indicia of reliability must be intrinsic to the statement or the declarant. Franqui I, 699 So. 2d at 1319. Because the trial court relied on Grossman, (as did both parties on appeal, with Defendant arguing that the statements were not truly interlocking) the trial court made no determination as to whether the statement was truly self-inculpatory. There is no reason, however, why this question, which merely requires a reading of the statement, could not be performed on appeal. Indeed the Florida Supreme Court did just that with regard to the codefendant's second statement in Franqui I. 699 So. 2d at 1320.

Because the Florida Supreme Court applied an incorrect standard in Franqui I in determining whether the statement against penal interest exception to the hearsay rule is "firmly rooted," which analysis it in turn applied herein, and because this Constitutional issue is one of conflict among the lower courts, the Court should accept jurisdiction to resolve the question.

B. The Florida Supreme Court erred in determining that a codefendant's statement can never exhibit sufficient particularized guarantees of trustworthiness to be admitted against the defendant unless it does not mention the defendant at all, regardless of whether the statement was wholly self-inculpatory, thoroughly interlocked with the defendant's confession, and was made after a knowing and intelligent waiver of constitutional rights.

Under Roberts, 448 U.S. at 64-66, and Wright, 497 U.S. at 814-15, if a statement does not fall within a firmly-rooted exception to the hearsay rule, it is inadmissible in the absence of evidence demonstrating particularized guarantees of trustworthiness. In Lee, 476 U.S. at 543, and Cruz, 481 U.S. at 194, the Court noted that even a codefendant's statement that satisfies this standard may be admissible directly against a defendant. Further, in Williamson, 114 S. Ct. at 2437, Justice O'Connor stated that "the very fact that a statement is truly self-inculpatory ... is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause."

Even assuming that the exception for statements against penal interest is not firmly rooted, the Florida Supreme Court has misconstrued the Confrontation Clause. The Florida Supreme Court, citing Justice O'Connor's statement in Williamson quoted above, concluded that the a codefendant's statement against penal interest demonstrates sufficient particularized guarantees of trustworthiness to be admissible.[17]

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[17] A number of courts, including those that have either rejected the notion that the penal interest exception is firmly rooted, or declined to decide the issue, have held that the statement's truly self-inculpatory nature constitutes a sufficient particularized guarantee of trustworthiness so as to allow the statement to be admitted. See, e.g., United States v. Barone, 114 F.3d 1284; 1301 (1st Cir. 1997); State v. Wilson, 918 P.2d 826, 837 (Or. 1996)

The court's error lies in its conclusion that to be "genuinely self-inculpatory" a statement must be "individually self-inculpatory," i.e., it must contain no reference whatsoever to the defendant. Franqui I, 699 So. 2d at 1320; see also San Martin, 1997 WL at *4, *13 (the admission of Franqui's confession was held to be error because it "implicate[d] San Martin in the planning and execution of this crime," despite the fact that "[i]n both confessions, San Martin was portrayed as an equal participant in this enterprise"). As discussed above, at Subpoint A, however, Williamson makes it clear that such a formalistic approach is inappropriate. The question is not whether the declarant mentions or inculpates any others in the course of his statement, but rather whether he fully inculpates himself. Although Williamson only addressed an evidentiary issue under the Federal Rules of Evidence, its misreading by the Florida Supreme Court still presents a basis for granting the writ because its overly-narrow reading of the case led to its conclusion that all statements by accomplices that mention the defendant violate the Sixth Amendment.

A "truly self inculpatory" statement is one of the particularized guarantees of trustworthiness, in part, also because it is not an attempt to shift blame or curry favor. Williamson, 114 S.Ct. at 2437. As noted in Subpoint A, although Gonzalez mentioned Defendant in his statement in the context of a joint enterprise, he also thoroughly inculpated himself and did not attempt to shift blame or curry favor. The self-inculpatory nature of the statement was thus itself a particularized guarantee of trustworthiness that should have

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State v. Mullaly, 1997 WL 651649, *4 (Wash. App. Oct. 9, 1997)(unpublished opinion); People v. Greenberger, 68 Cal. Rptr. 2d 61, 79 (App. 1997); People v. Thomas, 1997 WL 576337, *12 (Ill. Sept. 18, 1997); State v. Nielsen, 853 P.2d 256, 268 (Or. 1991). Others have suggested that the custodial statements of codefendants may never be admitted. See, e.g., Olson, noted above.

been, but was not, considered by the court below in determining admissibility under the Confrontation Clause.

A custodial statement by a codefendant such as that herein, however, bears other guarantees of trustworthiness. For example, before such statements may be admitted at trial, the State has the burden of establishing that such statements were made voluntarily -- i.e., that the confession was a product of free will, without coercion, duress or deception at the time of making the statement. Jackson v. Denno, 378 U.S. 368 (1964).[18] The State also bears the burden of establishing that such statements were made only after procedural safeguards were honored -- i.e., that Miranda[19] warnings were given -- and must show that the declarant waived the Miranda rights knowingly, intelligently and voluntarily. Miranda, 384 U.S. at 479. The trial court herein did in fact make pretrial determinations that both of these requirements had been met. These factors too, which bear directly on the circumstances surrounding the making of the statement, must also be considered in the trustworthiness determination. Wright, 497 U.S. at 820 ("We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief").

Finally, the statements of Defendant and Gonzalez were interlocking in every material respect. Franqui II, 699 So. 2d at 1335; see also R. 127, quoted at n.16, supra. This, too, was a

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[18] See also Land v. State, 293 So. 2d 704 (Fla. 1974), Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989), and Fla. R. Crim. P. 3.190, which have incorporated the requirements of Denno.

[19] Miranda v. Arizona, 384 U.S. 436 (1966).

factor that the court below should have considered as a particularized guarantee of trustworthiness, but did not. Cruz, 481 U.S. at 192 ("Quite obviously, what the 'interlocking' nature of the co-defendant's confession pertains to is not its harmfulness but rather its reliability")(emphasis supplied). Thus, in Cruz, it was noted that "[o]f course, the defendant's confession may be considered at trial in assessing whether his co-defendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him." 481 U.S. at 193-94 (citing Lee, 476 U.S. at 543-44). The court below recognized these statements in Cruz, but held that this Court had modified Cruz in Wright and thus the interlocking nature of statements could not be considered. Franqui I, 699 So. 2d at 1318-19. The truly interlocking nature of the statement is a circumstance which at least renders "the declarant particularly worthy of belief," as required in Wright, 497 U.S. at 820, especially when considered in conjunction with the truly self-inculpatory content of the statement, which does not attempt to shift responsibility, along with the voluntariness of the statement, and the fact that it was made after advisement and waiver of constitutional rights.

In Wright, 497 U.S. 823 n.*, this Court observed that in Cruz, it had "said nothing about whether the co-defendant's confession would be admissible against the defendant simply because it may have 'interlocked' with the defendant's confession." (Emphasis supplied). However, this is not a case of only relying on the fact that Defendant's and Gonzalez's statements interlock. Rather, the interlocking content is one factor, in conjunction with the other factors noted above, that may be considered in determining whether the statement bears sufficient indicia of reliability to overcome any presumption of unreliability.

Because the Florida Supreme Court has read Williamson to require the exclusion, on Sixth Amendment grounds, of all codefendant statements that mention the defendant, regardless of whether the statement is otherwise reliable, and because this issue is one of conflict among the courts, the Court should accept jurisdiction.[20]

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[20] Petitioner also submits that the Florida Supreme Court's harmless error analysis in the instant case is contrary to the express dictates of Cruz and Wright. In Franqui I, the court below recognized that, "it is equally clear that the interlocking nature of the confession is likely to render the Confrontation Clause violation harmless on appellate review." Franqui I, 699 So. 2d at 1321. The lower court thus concluded: "while that portion of [the codefendant's] confession which implicated Franqui should not have been introduced into evidence, the fact that it mirrors Franqui's confession in so may respects strongly indicates that the error was harmless." Id. In the opinion below, the court recognized that the allged Confrontation Clause violation is subject to harmless error review on appeal. Franqui II, 699 So. 2d at 1336. In concluding that the alleged error was harmful as to Defendant's sentence, however, the court below overlooked not only the interlocking nature of the confessions, but also the nature of the factors in aggravation and mitigation, as well as the evidence presented at trial. In reversing Defendant's sentence, the Florida Supreme Court cited its belief that Gonzalez's statement potrayed Defendant "as the leader of the robbery plan." Id. In light of the other substantial evidence presented, however, that conclusion is largely unwarranted. Moreover, to the extent that Defendant may be seen as more culpable than Gonzalez, such a conclusion would also be amply supported by the evidence presented in aggravation wholly unrelated to Gonzalez's statement, as well as the varying mitigation presented by Gonzalez and Defendant. Given Defendant's bloody history, that this was a crime of greed committed during a felony, and that the victim was a young police officer killed in the line of duty, when weighed against the insignificant mitigation presented, there can be no other reasonable conclusion than that any error relating to the brief inconsistencies in Gonzalez's statement was harmless beyond a reasonable doubt. Thus, pursuant to Cruz, Wright, and even the lower court's own decision in Franqui I, the admission of the codefendant's confession should have been deemed harmless beyond a reasonable doubt as to Defendant's sentence.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,
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APPENDIX

Supreme Court of Florida

LEONARDO FRANQUI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

No. 84,701

[July 3, 1997]

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Leonardo Franqui. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm Franqui's convictions. However, because we find a violation of appellant's Sixth Amendment constitutional right to confront his accusers, we reverse his death sentence and remand for a new sentencing proceeding before a jury.

FACTS

The defendant, Leonardo Franqui, along with codefendants Pablo San Martin, Ricardo Gonzalez, Fernando Fernandez, and Pablo Abreu were charged with first-degree murder of a law enforcement officer, armed robbery with a firearm, aggravated assault, unlawful possession of a firearm

while engaged in a criminal offense, grand theft third degree, and burglary.[21] Franqui, Gonzalez, and San Martin were tried together before a jury in May, 1994.

The record reflects that the Kislak National Bank in North Miami, Florida, was robbed by four gunmen on January 3, 1992. The perpetrators made their getaway in two stolen grey Chevrolet Caprice cars after taking a cash box from one of the drive-in tellers. During the robbery, Police Officer Steven Bauer was shot and killed. Shortly after the robbery, the vehicles were found abandoned two blocks west of the bank.

Approximately two weeks later, codefendant Gonzalez was stopped by police after leaving his residence on January 18, 1992. He subsequently made unrecorded and recorded confessions in which he told police that Franqui had planned the robbery, involved the other participants and himself in the scheme, and chosen the location and date for the crime. He said that Franqui had procured the two stolen Chevys, driven one of the cars, and supplied him with the gun he used during the robbery. He further stated that Franqui was the first shooter and shot at the victim three or four times, while he had shot only once. Gonzalez indicated that he shot low and believed he had only wounded the victim in the leg. Gonzalez consented to a search of his apartment which revealed $1200 of the stolen money in his bedroom closet. He was subsequently reinterviewed by police and, among other things, described how

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[21] One count of aggravated assault and the unlawful possession of a firearm while engaged in a criminal offense were nol prossed by the State after its opening statement.

Franqui had shouted at the victim not to move before shooting him.[22]

Franqui was also questioned by police on January 18, 1992, in a series of unrecorded and recorded sessions. During his preinterview, Franqui initially denied any involvement in the Kislak Bank robbery, but when confronted with the fact that his accomplices were in custody and had implicated him, he ultimately confessed. Franqui stated that Fernandez had hatched the idea for the robbery after talking to a black male, and he had accompanied the two men to the bank a week before the robbery actually took place. He maintained that the black male friend of Fernandez had suggested the use of the two stolen cars but denied any involvement in the thefts of the vehicles. According to Franqui, San Martin, Fernandez and Abreu had stolen the vehicles. Franqui did admit to police that he and Gonzalez were armed during the episode, but stated that it was Gonzalez--and not himself--who yelled at the victim to "freeze" when they saw him pulling out his gun. Franqui denied firing the first shot and maintained that he fired only one shot later.

At trial, over the objection of Franqui, the confessions of codefendants San Martin and Gonzalez were introduced without deletion of their references to Franqui, upon the trial court's finding that their confessions "interlocked" with Franqui's own confession. In addition, an eyewitness identified Franqui as the driver of one of the Chevrolets leaving the bank after the robbery, and his fingerprints were found on the outside of one of the vehicles. Ballistics evidence demonstrated that

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[22] San Martin also made a confession to police, in which he stated that the robbery was planned by a black friend of the codefendant Fernandez and that the planning occurred at Fernandez's apartment. San Martin admitted that he had grabbed the money tray during the robbery but could not say who carried guns or did the shooting.

codefendant Ricardo Gonzalez had fired the fatal shot from his .38 revolver, hitting the victim in the neck, and that Franqui had shot the victim in the leg with his .9 mm handgun.

Franqui was convicted on all counts, and after a penalty phase trial the jury recommended death by a vote of nine to three. The trial court followed the jury's recommendation and sentenced Franqui to death. Franqui presents the following claims on appeal: (1) that the trial court erred in denying Franqui's peremptory challenges of jurors Diaz and Andani; (2) that the trial court abused its discretion in granting the State's peremptory challenge of juror Pascual because the State's reasons for striking this juror were not gender neutral; (3) that the trial court erred in denying Franqui's motion for severance based upon the introduction of nontestifying codefendant Gonzalez's confession at their joint trial; (4) that the trial court erred in admitting the prosecutor's comments to the jury concerning the victim's personality and character; and (5) that the trial court erred in sentencing Franqui to death.

We find claim 2 to be procedurally barred under Joiner v. State, 618 So. 2d 174 (Fla. 1993), because defense counsel failed to properly renew his objection to juror Pascual before accepting the jury and allowing it be sworn.[23] See Joiner, 618 So. 2d at 176 n.2 (requiring strict construction of rules of preservation because otherwise, the defense "could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial"). Similarly, we find claim 4, dealing with the prosecutor's allegedly improper comments

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[23] In this case, defense counsel accepted the jury panel "subject to our previous objection," but then allowed the trial court to define his objection as limited to jurors "Diaz, Andani and Weaver." At no time did defense counsel renew his objection to juror Pascual or otherwise disabuse the trial court of the notion that his objection to the jury was not limited to the three jurors specifically identified by the court.

appealing to jurors' sympathy also to be procedurally barred because it was not properly preserved for review.[24] We also decline to address the merits of claim 5 because these sentencing issues are rendered moot by our decision here to remand for a new penalty phase trial. We address the remaining claims below.

JURY SELECTION

Franqui first contends that the trial court erred in denying his exercise of a peremptory challenge to excuse prospective juror Diaz from the jury. The initial colloquy on the issue was as follows:

> MS. BRILL: Wait a minute, Judge, are they striking Aurelio Diaz? State would challenge that strike.
>
> THE COURT: On Aurelio Diaz, let me hear your reasons. Mr. Diaz [the defense counsel], your grounds?

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[24] First, as Franqui concedes, the allegedly inflammatory comments made during the state's opening statement received no objection and therefore are unpreserved. Castor v. State, 365 So. 2d 701 (Fla. 1978). Similarly, we decline to address the alleged prosecutorial misconduct in relation to bank teller Hadley's testimony because it too failed to receive a sufficient objection. See Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1986) (holding that objections must be made with sufficient specificity to apprise trial court of potential error and preserve point for appellate review). Finally, the potential error in allowing Ms. Chin-Watson, another bank teller whom the victim in this case was escorting when he was shot, to testify about her friendship with Officer Bauer was objected to at trial. Nevertheless, we find that Chin-Watson's brief statement, even if improper, was harmless beyond a reasonable doubt. See Stein v. State, 632 So. 2d 1361, 1367 (Fla. 1994) (finding brief humanizing comments do not constitute grounds for reversal).

MR. DIAZ: I don't like him.

THE COURT: Okay, that, in that case I will have to disallow that being the reason, I will have to disallow your strike. As it is not a race neutral reason.

We have consistently held that trial courts have broad discretion in determining the propriety of the exercise of peremptory challenges. Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Files v. State, 613 So. 2d 1301 (Fla. 1992). We conclude that the trial court did not abuse its discretion in striking Franqui's peremptory challenge.

We cannot agree with the dissenting opinion that the State's objection was insufficient to permit the trial court to make inquiry with respect to whether juror Diaz was being challenged for nonracial reasons. In support of their position, the dissenters rely on Windom v. State, 656 So. 2d 432 (Fla.), cert. denied, 116 S. Ct. 571 (1995), and Melbourne v. State, 679 So. 2d 759 (Fla. 1996), both of which stated that a party objecting to the other side's use of a peremptory challenge on racial grounds must show that the person being challenged is a member of a distinct racial group.

Our holding in Windom was that there was not a sufficient objection to reverse the trial court for not requiring the challenging party to provide race-neutral reasons for the challenge. Thus, the rationale of Windom would be pertinent if the trial court in the instant case had declined to inquire into the racial basis for the challenge. Here, however, the trial court clearly understood that the objection to the challenge of a venireperson in Dade County, who was born and raised in Havana, Cuba, and whose name was Aurelio Diaz, was being made on racial grounds. This is especially true because there

was never any contention made to the trial court that prospective juror Diaz was not a member of a cognizable minority or that there should not be a Neil[25] inquiry. Moreover, we have encouraged trial judges to err on the side of holding a Neil inquiry. State v. Slappy, 522 So. 2d 18 (Fla. 1988). See Curtis (upholding denial of peremptory challenge in face of contention that objecting party had failed to make a prima facie showing of discrimination). The facts of Melbourne are equally inapposite. In that case, the objection to the challenge was clearly made on racial grounds, but the objecting party failed to preserve the issue for review because the objection was not renewed before the jury was sworn.

Standing alone, defense counsel's statement, "I don't like him," may appear to be a race-neutral reason. However, the trial court was obligated to evaluate the credibility of this statement in the full context in which this statement was made. The present record reveals that juror Diaz was questioned extensively by the court, the State, and defense counsel. The questioning takes place over nearly a half-dozen pages of transcript and yields no obvious reason for disqualification. When defense counsel, as an afterthought, later made an attempt to justify the challenge with other reasons, it was the trial court's responsibility to evaluate these reasons to determine whether they were credible. As we explained in Melbourne, "the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." 679 So. 2d at 764-65. This trial court's determination to strike the challenge of prospective juror Diaz was not clearly erroneous.[26]

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[25] In State v. Neil, 457 So. 2d 481 (Fla. 1984), we first authorized trial courts to make inquiry into whether peremptory challenges were being exercised for racial reasons.

[26] We also reject Franqui's contention that the trial court erred in refusing to permit him to challenge prospective juror Ondani.

ADMISSION OF CODEFENDANT'S STATEMENTS AGAINST FRANQUI

Franqui also asserts that the trial court erred by permitting the confession of his codefendant Ricardo Gonzalez to be admitted against him in their joint trial and by denying his motion to sever his trial from that of his codefendant. In Franqui v. State, No. 83,116 (Fla. June 26, 1997), we discussed in detail the law applicable to the admissibility of a codefendant's confession. In this case, there is no question that Gonzalez's confession interlocked with Franqui's confession in many respects and was substantially incriminating to Franqui. Moreover, we cannot say that the totality of the circumstances under which Gonzalez made his confession demonstrated the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability that attaches to accomplices' hearsay confessions which implicate the defendant.

Thus, the admission of Gonzalez's confession was error. However, with respect to guilt, we conclude that the error was harmless beyond a reasonable doubt. Not only did Franqui confess to participating in the robbery, he also admitted shooting the victim. He does not contest the legality of his confession in this appeal. In addition, a bullet recovered from the victim came from Franqui's gun, and an eyewitness identified Franqui as the driver of one of the stolen cars leaving the scene of the crime. Finally, Franqui's fingerprints were also found on one of the stolen vehicles used to commit the crime. Thus, we conclude that there is no reasonable possibility that the erroneous admission of Gonzalez's confession contributed to Franqui's conviction for felony murder.

PENALTY

We agree, however, that Franqui's sentence must be reversed. In Gonzalez's confession he went into great detail in characterizing Franqui as the leader of the robbery plan, and this confession easily could have prejudiced Franqui in the penalty phase deliberations. Accordingly, we affirm Franqui's convictions but remand for a new penalty phase proceeding consistent with this opinion.

It is so ordered.

OVERTON, SHAW, GRIMES and WELLS, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J., concurs.

HARDING, J., dissents with an opinion, in which KOGAN, C.J. and ANSTEAD, J., concur.

ANSTEAD, J., concurring in part and dissenting in part.

I agree with Justice Harding that this case should be reversed because of the clear error in the trial court's ruling on appellant's peremptory challenge of juror Diaz. As noted by Justice Harding, the majority opinion creates a serious perception of an unjust double standard being applied to death-sentenced defendants when this case is compared to Windom v. State, 656 So. 2d 432, 437 (Fla.), cert. denied, 116 S. Ct. 571, 133 L. Ed. 2d 495 (1995).

I agree with the majority, however, that the trial court erred by permitting the confession of the codefendant, Ricardo Gonzalez, to be admitted against Franqui at their joint trial and by denying Franqui's motion to sever his trial from that of his

codefendant. Of course, both of these serious errors require that a new trial be ordered.

PEREMPTORY CHALLENGE

Initially, I note that the majority's reasoning is seriously flawed on the peremptory challenge issue since it is erroneously predicated upon the assumption that the trial court focused on the credibility of defense counsel's proffered reasons for the challenge. The record, however, demonstrates the opposite: the trial court mechanically applied an "I don't think that is a race-neutral reason" test. The majority has simply turned a blind eye to the obvious error in this case. As Chief Judge Schwartz declared in reversing a murder conviction under identical circumstances in Betancourt v. State, 650 So. 2d 1021 (Fla. 3d DCA 1995):

> Our holding that overruling the attempted strike of Garcia was reversible error is essentially based upon the fact that there is no basis whatever for concluding that the challenge involved the evil proscribed by the Batson-Neil rule; that is, that it was based on a "constitutionally impermissible prejudice," State v. Slappy, 522 So.2d 18, 20 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988), or racially motivated in any way. In this case, the Hispanic defendant challenged a Hispanic prospective juror. On the face of it--and there is nothing in the record to suggest otherwise--there would seem no basis for even implying a racial reason for Betancourt's not wanting Garcia to serve on his jury. See Portu v. State, 651 So. 2d 791 (Fla. 3d DCA 1995). In this respect, the case is decisively unlike the

overwhelming majority of cases--if not every case--in which a peremptory challenge has been disallowed under Batson and Neil. Typically--if not invariably--they involve situations in which the prospective juror belongs to a group whose general characteristics would seem to be adverse to the position of the challenger. E.g., J.E.B. v. Alabama ex. rel. T.B., __U.S.__, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994)(defendant's challenge to female juror in paternity action); Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986) (prosecutions's challenge to black juror in case with black defendant); Slappy, 522 So.2d at 18 (same); State v. Neil, 457 So. 2d 481 (Fla. 1984) (same); Abshire v. State, 642 So. 2d 542 (Fla. 1994)(state's challenge to exclude women with male defendant); State v. Alen, 616 So. 2d 452 (Fla. 1993) (prosecution's challenge to Hispanic juror in case with Hispanic defendant); Joseph v. State, 636 So. 2d 777 (Fla. 3d DCA 1994) (state's challenge of Jewish venireperson in case with Jewish defendant). When, as here, there is no reason in common sense, legal intuition or the record to overcome "the presumption that peremptories will be exercised in a non-discriminatory manner," Neil, 457 So. 2d at 486; State v. Johans, 613 So. 2d 1319 (Fla. 1993), or to justify a finding of "discriminatory intent," which is the critical, indeed the only, issue in question, see Hernandez v. New York, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395, 406 (1991), no strike may be countermanded. See Johans, 613 So. 2d at 1321 (Neil inquiry required when objection raised that

peremptory challenge is being used "in a racially discriminatory manner"); Portu, 651 So. 2d at 791.

650 So. 2d at 1023 (footnotes omitted). In addition to the striking similarity of the circumstances in Betancourt, the Third District opinion also noted the same inadequacy of the State's objection in Betancourt as exists here:

> The request for a "race-neutral" explanation was both made and, without objection acceded to, entirely on the basis that the challenge was to a juror who happened to be Hispanic. The parties and the court thus proceeded upon a mutual misunderstanding of State v. Johans, 613 So. 2d 1319 (Fla. 1993), which governed this trial because it occurred after it was decided. Johans provides that a Neil inquiry is required only when "an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." 613 So. 2d at 1321. There was no such objection below and the record shows that none could have been raised in good faith.

650 So. 2d at 1022 n.2 (emphasis added). Chief Judge Schwartz' analysis is clearly applicable here. Even if the State had noted juror Diaz's ethnicity or race for the record--and I agree with Justice Harding that the State did not--there was absolutely no reason for the trial court to require Franqui, a Cuban, male defendant, to provide a race-neutral justification for striking prospective juror Diaz, presumably a Cuban male resident of Dade County. If there is ever a case where the presumption that preemptory strikes are exercised in a non-discriminatory manner holds true, it is this one.

FLORIDA EVIDENCE CODE

Although the majority discusses the constitutional problem with admitting the codefendant's out-of-court hearsay statement, the majority fails to note that the statement was not admissible under the Florida Evidence Code. The statement was hearsay and fails to qualify under any hearsay exception.

When a codefendant's confession is obtained in a custodial setting, as was the case here, the only hearsay exception that has potential applicability is the "statement against interest" exception.[1] See § 90.804(2)(c), Fla. Stat. (1995). Section 90.804(2)(c) states:

> Statement Against Interest. A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the defendant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating

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[1] Unlike the Federal Evidence Code, see Fed. R. Evid. 804(b)(5), the Florida Evidence Code does not contain a "catch-all" exception to the hearsay rule. The federal "catch-all" exception admits any hearsay statement, even though it is not admissible under a listed exception, which possesses the same guarantees of trustworthiness as do the listed exceptions.

I would not foreclose the possibility that a confession obtained in a non-custodial, non-interrogatory setting may qualify under a different hearsay exception, such as the "excited utterance" or "spontaneous statement" exceptions. See § 90.803(1), (2), Fla. Stat. (1995).

circumstances show the trustworthiness of the statement.

Of course, for a statement to be admissible as a statement against interest, a trial judge also must find that: (1) the declarant is unavailable as a witness, see § 90.804(1), Fla. Stat. (1995); (2) "a person in the declarant's position would not have made the statement unless he [or she] believed it to be true," Peninsular Fire Ins. Co. v. Wells, 438 So. 2d 46 (Fla. 1st DCA), review dismissed, 443 So. 2d 980 (Fla. 1983); (3) the statement is not only against the declarant's interest when made, but the declarant is also aware of that fact, Dinter v. Brewer, 420 So. 2d 932, 935 n.4 (Fla. 3d DCA 1982); and (4) corroborating circumstances clearly indicate the trustworthiness of the statement, Maugeri v. State, 460 So. 2d 975, 977 (Fla. 3d DCA 1984), cause dismissed, 469 So. 2d 749 (Fla. 1985). See United States v. Riley, 657 F.2d 1377 (8th Cir. 1981), cert. denied, 459 U.S. 1111, 103 S. Ct. 742, 74 L. Ed. 2d 962 (1983).

The Federal Evidence Code also has a "statement against interest" exception. In Williamson v. United States, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), the United States Supreme Court narrowly construed the federal "statement against interest" exception[2] so that only those declarations or remarks within a confession that "are individually self-inculpatory" are included within the exception as statements against penal interest.[3] "The fact that a person is making a

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[2] The corollary provision of the Federal Evidence Code is found under rule 804(b)(3).

[3] The Supreme Court planted the seed for its reasoning set out in Williamson in Lee v. Illinois, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986), where it rejected the State of Illinois' categorization of the codefendant's confession as a simple "declaration against penal interest." The Court explained that this specific hearsay exception "defines too large a class for meaningful Confrontation Clause analysis." Lee at 544 n.5.

broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." Id. at 599. The Court found that this was "especially true when the statement implicates someone else." Id. at 601. In explaining its rationale, the Court, through Justice O'Connor, stated:

> To decide whether Harris' confession is made admissible by Rule 804(b)(3), we must first determine what the Rule means by "statement," which Federal Rule of Evidence 801(a)(1) defines as "an oral or written assertion." One possible meaning, "a report or narrative," Webster's Third New International Dictionary 2229, defn. 2(a)(1961), connotes an extended declaration. Under this reading, Harris' entire confession--even if it contains both self-inculpatory and non-self-inculpatory parts--would be admissible so long as in the aggregate the confession sufficiently inculpates him. Another meaning of "statement," "a single declaration or remark," ibid., defn. 2(b), would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory. See also id., at 131 (defining "assertion" as a "declaration"); id., at 586 (defining "declaration" as a "statement").
>
> Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe

> them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> . . . And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

Williamson, 512 U.S. at 599-600. Thus, under Williamson a nontestifying codefendant's confession which also implicates the defendant can be admitted in their joint trial only if it sensibly and fairly can be redacted to include only those statements which are solely self-inculpatory vis-a-vis the codefendant. See § 90.108, Fla. Stat. (1995); see also Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). For example, Justice Kennedy noted in his separate opinion in Williamson:

> In the criminal context, a self-serving statement is one that tends to reduce the charges or mitigate the punishment for which the declarant might be liable. See M. Graham, Federal Practice and Procedure, §6795, p. 810,

> n.20 (1992). For example, if two masked gunmen robbed a bank and one of them shot and killed the bank teller, a statement by one robber that the other robber was the triggerman may be the kind of self-serving statement that should be inadmissible. See ibid. (collateral self-serving statement is "John used the gun"). (The Government concedes that such a statement may be inadmissible. See Brief for United States 12.)

Under Williamson and Richardson, a codefendant's confession which in fact partially exonerates or reduces the culpability of the codefendant by implicating or shifting the blame to another defendant is not a statement against the codefendant's interest. Such a statement is admissible in a joint trial with another defendant only if the statement falls within another hearsay exception, and none has been suggested here.

Under this analysis, the testimony of Detective Diecidue as to the oral confession of Ricardo Gonzalez as well as the taped recording of Gonzalez's confession were erroneously admitted into evidence. While portions of Detective Diecidue's testimony and Gonzalez's taped confession concerned solely self-inculpatory statements made by Gonzalez, other portions directly implicated defendant Franqui and also served to exonerate codefendant Gonzalez. Both Gonzalez's confession and the detective's testimony described Franqui as the mastermind behind the robbery, who involved Gonzalez and the other participants in the plan and otherwise played the leading role in their criminal activity. Gonzalez's confession and the detective's' testimony identify Franqui as the procurer of the stolen cars, the supplier of Gonzalez's weapon, and the first shooter, who fired at the victim three to four times while Gonzalez shot only once. Consequently, those statements were

inadmissible under the Florida Evidence Code and Williamson.

HARMLESS ERROR

Further, because Gonzalez's confession placed the bulk of the blame for the robbery and murder on Franqui, I cannot find that this error was harmless under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (error harmless only if there is no reasonable possibility that the error contributed to the conviction). It is reasonable to assume that a jury would utilize a statement placing the majority of the blame on Franqui in deciding upon a verdict and sentence against him, since that was the very reason advanced by the State for seeking to use the statement in evidence against him in the first place.

KOGAN, C.J., concurs

HARDING, J., dissenting.

I dissent from the majority opinion in regard to the jury selection issue. Franqui argues that the trial court erred in denying his use of peremptory challenges to excuse two prospective jurors from the jury. While I find no error as to one of the prospective jurors, I find the record to be barren of any support for the trial court's denial of Franqui's peremptory challenge of prospective juror Diaz. Because I find that this issue requires reversal of Franqui's conviction, I dissent from the majority opinion.

I dissent for the following reasons: 1) The majority has abandoned this Court's precedent that requires the party objecting to the use of a peremptory challenge to carry the burden to trigger a Neil[1] inquiry and mandates that the record

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[1] State v. Neil, 457 So. 2d 481 (Fla. 1984).

demonstrate that the challenged person is a member of a distinct racial group. 2) The majority opinion sets up a double standard -- one requiring a defendant to meet specific requirements before a Neil inquiry is necessary while allowing the State to trigger a Neil inquiry without meeting the same requirements. 3) By approving the trial court's handling of this matter, the majority confirms the trial court's assertion that peremptory challenges no longer exist. 4) By any standard, even if the State properly triggered a Neil inquiry, the reasons ultimately given by the defendant for the challenge were race-neutral and sufficient to support the challenge.

I.

The majority opinion essentially forsakes this Court's precedent regarding Neil inquiries. When Franqui attempted to peremptorily strike from the venire Aurelio Diaz, the State objected but offered no explanation nor basis of any kind for the objection. The initial colloquy on the issue was as follows:

> MS. BRILL: Wait a minute, Judge, are they striking Aurelio Diaz? State would challenge that strike.
>
> THE COURT: On Aurelio Diaz, let me hear your reasons. Mr. Diaz [the defense counsel], your grounds?
>
> MR. DIAZ: I don't like him.
>
> THE COURT: Okay, that, in that case I will have to disallow that being the reason, I will have to disallow your strike. As it is not a race-neutral reason.

I believe that the State's objection here was insufficient to require the defendant, the party exercising the peremptory challenge, to justify his peremptory strike. This record simply does not demonstrate that the challenged juror was a member of a protected group or that the challenge appeared to be used in a racially discriminatory manner. It is a stretch of the imagination and beyond logic how the majority, as the appellate court charged with reviewing the trial court's action, can conclude from this record that "the trial court clearly understood that the objection to the challenge of a venireperson in Dade County, who was born and raised in Havana, Cuba, and whose name was Aurelio Diaz, was being made on racial grounds." Majority op. at 7. In fact, at oral argument, the State candidly conceded that we cannot know from this record whether the challenged juror was a member of a distinct racial group, or whether his color or national origin was even the basis of the State's objection to the strike.

In Windom v. State, 656 So. 2d 432, 437 (Fla.), cert. denied, 116 S. Ct. 571, 133 L. Ed. 2d 495 (1995), this Court expressly rejected a capital defendant's claim that his objection to the State's use of a peremptory challenge was sufficient to require a Neil inquiry. In Windom, we affirmed a capital conviction and death sentence and held that the defendant had failed to carry his initial burden in objecting to the State's use of a peremptory challenge to excuse an East Indian woman. We stated that the law

> requir[ed] a Neil inquiry when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. However, a timely objection and a demonstration on the record that the challenged person is a member of a distinct racial group have consistently been held to be necessary.

Id. at 437 (emphasis added). Specifically, we observed that defense counsel did not make a timely objection which demonstrated on the record that the prospective juror was a member of a cognizable class. We concluded "that the defendant's expressed objection did not make it necessary for the trial court to require the State to have and express a race-neutral reason for the challenge." Id. We also reaffirmed the principle that a timely objection and demonstration on the record that the challenged juror is a member of a distinct racial group is a necessary prerequisite to trigger a Neil inquiry. Id.

Under our recent decision in Melbourne v. State, 679 So. 2d 759 (Fla. 1996),[2] we have continued to impose a substantial burden on the party objecting to the exercise of a peremptory challenge by the other side:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.

Id. at 764 (emphasis added) (footnotes omitted). When a party objects to an opposing party's use of a peremptory challenge, the basis of the objection and the challenged juror's race or ethnicity cannot be left to inference. Rather, the party objecting to the

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[2] I recognize that the trial judge in this case did not have the benefit of our decisions in Melbourne and Windom. However, those opinions merely restate the requirements that this Court has set forth in opinions rendered before the trial here. See Melbourne, 679 So. 2d at 764 nn.2-5; Windom 656 So. 2d at 437.

challenge must demonstrate on the record that the juror is a member of a particular group at the time the objection is made. Id.

In the instant case, the State's objection failed to claim that the peremptory challenge was being used in a racially discriminatory manner and also failed to demonstrate on the record that the challenged juror was a member of a protected group. Not only did the State fail to demonstrate the racial or ethnic identity of the challenged juror on the record as the defendant in Windom similarly failed to do, but the record also fails to reflect that anyone, including the trial court, demonstrated such identity on the record. This Court has repeatedly stated that "peremptories are presumed to be exercised in a nondiscriminatory manner." Melbourne, 679 So. 2d at 764; Neil, 457 So. 2d at 486. Without a clear record to support the trial court's denial of Franqui's peremptory challenge, I cannot agree with the majority that the trial court's action "was not clearly erroneous." Majority op. at 8 [A-7].

II.

I am also distressed that in its holding affirming the trial court, the majority has instituted a double standard for reviewing trial court rulings relating to peremptory challenges. Here, the majority has determined that the State's general objection was sufficient to trigger a Neil inquiry. However, in other cases where a defendant has objected to the State's use of a peremptory challenge, this Court has concluded that the objecting defendant must meet very specific requirements--state adequate reasons to initiate a Neil inquiry and create a record adequate to review. Windom; Melbourne. I would apply the same requirements without regard to who the objecting party is. Not only should what's good for the goose be good for the

gander, but also what cooks one party's goose should also cook the other's.

III.

The error here is compounded by the majority's apparent approval of the trial court's erroneous assertion that "peremptory challenges no longer exist."[3] By accepting the State's position that the objection here was sufficient to trigger a Neil inquiry, the majority essentially approves this view. If nothing more that a general objection can thwart the use of peremptory challenge, then we do eliminate peremptory challenges as they have been used historically and substitute in their place two classes of challenges for cause.

IV.

Finally, even if I agreed with the majority that the State had properly raised the issue of the discriminatory use of a peremptory challenge in the first instance, I could not conclude that Franqui's proffered reasons for striking Diaz were insufficient to justify his peremptory challenge. Subsequent to the initial exchange concerning juror Diaz, Franqui's counsel informed the court of additional "race-neutral" reasons for objection to Diaz, including his lengthy employment by Metropolitan Dade County:

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[3] Before the discussion as to juror Diaz, the trial court refused to allow a prior peremptory challenge. In explaining its reasoning in refusing the challenge, the court stated:

> Personally I think that the entire body of law in this area is outrageous, but it is clear that peremptory challenges no longer exist, and that neutral reasons must be given and you have not given me any.

> We would renew our peremptory based upon the fact that Mr. Diaz has had the same job basically for the last thirty years and we feel that he lacks the life experience and variety of occupations that we-are looking for on this jury. He also stated that he has two daughters, he has never had a problem with the daughter and he may not sympathize with our defendants who I am sure have given their parents many, many problems in the past, so based on that, we would try to excuse Mr. Diaz . . . . In addition to that Judge, many of the witnesses who are expected to testify for the state in this case are employed by Metropolitan Dade County. Which he has an allegiance with them for over thirty years in the county.

The trial court ruled that these were not race-neutral reasons for the challenge; the majority characterizes them as an "afterthought." Majority op. at 8 [A-7]. I cannot agree with either conclusion.

Peremptory challenges may be exercised up to point where the jury is sworn. Fla. R. Crim. P. 3.310 ("The state or defendant may challenge an individual prospective juror before the juror is sworn to try the cause . . . ."). A renewed peremptory challenge based upon additional reasons should not be dismissed as an "afterthought"[4] and must be assessed under the same standard as the original challenge.

As the United States Supreme Court recently explained in Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 1771, 131

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[4] The trial court did not treat the renewed challenge as an afterthought and ruled that the additional reasons were not race-neutral.

L. Ed. 2d 834 (1995), the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. After the opponent of a peremptory challenge has made out a prima facie case of racial discrimination, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. 514 U.S. at 767. If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. Id. The explanation offered by the party attempting to exercise the peremptory challenge need not be "persuasive, or even plausible." Id. at 768. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. Id. Only after these two steps have been met does the persuasiveness of the proffered justification become relevant and then only in the context of determining "whether the opponent of the strike has carried his burden of proving purposeful discrimination." Id.

In the instant case, the majority has disregarded its prior pronouncements relating to the burdens involved. The majority concludes that the trial court "clearly understood" that the State's objection was being made on racial grounds, "especially ... because there was never any contention made to the trial court that prospective juror Diaz was not a member of a cognizable minority or that there should not be a Neil inquiry." Majority op. at 3-4 [A-6]. Instead of determining whether the State proved purposeful racial discrimination, the majority has placed the burden on the defendant to prove a lack of discriminatory intent in exercising this peremptory challenge. While "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination," Purkett, 514 U.S. at 768, I cannot agree with the trial court or the majority that the defendant's justifications here fall into that realm. Thus, I could not sanction the trial court's conclusion

here even if I found that the State had made a prima facie case of racial discrimination.

Finally, my previously stated concern that this Court is creating a double standard requiring defendants to meet higher requirements than the State is born out by our decision in Smith v. State, No. 83,485 (Fla. July 3, 1997). I concurred in that opinion in which the Court affirmed a trial judge's ruling to sustain the State's peremptory challenge of an African-American juror over a properly raised Neil objection by the defense. The State submitted the following race-neutral reasons to strike the juror in question: "(1) her occupation as a guidance counselor; (2) the possibility she would err on the side of life during the penalty phase; and (3) her reference to Oprah Winfrey." Smith, slip op. at 5. This Court concluded that the trial court's decision to sustain the strike was not clearly erroneous. Id. at 5. Certainly, the reasons stated by the defense in the instant case are as race-neutral as those approved by this Court in Smith. I find it strange that, although they come out of the same pot, the defendant's goose gets cooked and the State's does not.

CONCLUSION

For the reasons stated above, I conclude that the trial court erred in prohibiting defense counsel from striking Diaz. As a result, and over Franqui's objection, juror Diaz was improperly allowed to remain on the jury that ultimately convicted Franqui and recommended a sentence of death. Such error is not subject to a harmless error review and requires a new trial. See United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996) (finding that erroneous denial of peremptory challenge is not subject to harmless error analysis and requires automatic reversal).

KOGAN, C.J. and ANSTEAD, J., concur.

Supreme Court of Florida

TUESDAY, OCTOBER, 1997

LEONARDO FRANQUI,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 84,701
	*	
STATE OF FLORIDA,	*	Circuit Court No.91-2141(B)
	*	(Dade)
Appellee.	*	
	*	

* * * * * * * * * * * * * * * *

Appellee's Motion for Rehearing is hereby denied.
KOGAN, C.J., OVERTON, SHAW, GRIMES, HARDING WELLS and ANSTEAD, JJ., concur

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Appellant's Motion for Rehearing is hereby denied.

OVERTON, SHAW, GRIMES, and WELLS, JJ., concur
KOGAN, C.J., HARDING and ANSTEAD, JJ., dissent

A True Copy TC

TEST

Sid J. White
Clerk, Supreme Court

cc: Hon. Harvey Ruvin, Clerk
Hon. Rodolfo Sorondo, Jr., Judge

Mr. Eric M. Cohen
Mr. Randall Sutton